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Supreme Court, U.S.
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No. 99-1184

In the Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, David L. Paris, through undersigned counsel, respectfully requests leave to file his Brief in Opposition without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

Respondent Paris was represented by appointed counsel at trial and on direct appeal in the state courts. Respondent's appeal to the Supreme Court of Ohio and subsequent Federal Habeas Corpus proceedings all proceeded *in forma pauperis*.

Respondent's affidavit in support of this motion is attached hereto.

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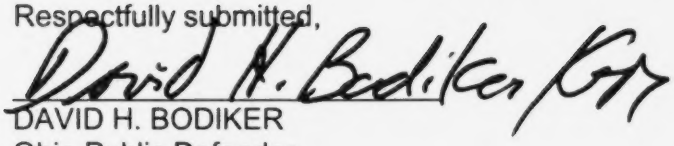
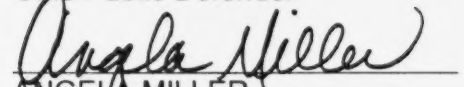
Respectfully submitted,



DAVID H. BODIKER
Ohio Public Defender



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No. 99-1184

In the Supreme Court of the United States

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-vs-

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ON PETITION FOR WRIT OF CERTIORARI
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AFFIDAVIT OF INDIGENCY

I, **David L. Paris**, being first duly sworn, depose and say that in support of my Brief in Opposition without being required to pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefore and that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs associated with filing a Brief in Opposition are true.

1. Are you presently employed? YES

A. If the answer is yes, state the amount of your salary or wages per month and give the name of your address of your employer. $1280 Truckline Tool & Machine Inc, 200 Eagle City Road

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? no

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? yes

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? no

A. If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. Amber Paris & Preston Paris Daughter & son

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

David L. Paris

DAVID L. PARIS

Duly witnessed and sworn before me, a Notary Public, on this 31 day of March, 2000.

NOTARY PUBLIC

My Commission expires
September 16, 2001

No. 99-1184

In the Supreme Court of the United States

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-vs-

DAVID L. PARIS,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT PARIS' BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENT

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QUESTIONS PRESENTED

1] Whether this Court should revisit the issue that an attorney appointed to represent an incarcerated client on direct appeal has a duty to: 1] raise obvious and reversible errors on appeal and; 2] communicate and consult with that client so that he knows how to proceed and that the complete failure to do so rises to the level of a Sixth Amendment violation that may serve as cause for excusing a procedural default. *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts. v. Lucey*, 469 U.S. 387 (1985); *Murray v. Carrier*, 477 U.S. 478 (1986).

2] Whether this Court should review the form of relief that was awarded to Respondent Paris – a matter that is purely discretionary – especially when the constitutionality of vesting this power with the federal courts is entirely settled. *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Evitts v. Lucey*, 469 U.S. 387, 391, 405 (1985).

THIS COURT DOES NOT HAVE JURISDICTION TO ADDRESS THE WARDEN'S PETITION FOR WRIT OF CERTIORARI

The Warden fails to inform this Court that the mandate issued by the Sixth Circuit in Respondent Paris' case was never stayed, the conditional writ of habeas corpus issued, and that the State of Ohio has never taken any action to retry him. The finite time period specified by the district court to try Respondent Paris has expired. Thus, this case is moot. A more extended discussion of why this Court lacks jurisdiction is contained within the Argument section of this brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Ohio R. App. P. 26(B) (Rule 26(B)) is reproduced in the appendix to this brief in opposition.

4. Current and Former S.Ct. Prac. R. II(2)(D)(1) are reproduced in the appendix to this brief in opposition.

5. Ohio Revised Code Section 2945.71 is reproduced in the appendix to this brief in opposition.

6. 28 U.S.C. §2243 (1984) is reproduced in the appendix to this brief in opposition.

STATEMENT OF THE CASE

On September 24, 1990, a Clark County, Ohio Grand Jury returned an indictment charging David Paris with one count of Felonious Assault, in violation of Ohio Revised Code Section 2903.11. Mr. Paris pleaded not guilty and vigorously protested his innocence at trial. However, on June 21, 1991, the jury found Mr. Paris guilty. Due to Mr. Paris' indigency, the trial court appointed counsel to assist him on direct appeal.

The trial court appointed Stephen Schutte for Mr. Paris' direct appeal. He filed a five-paragraph "brief" on Mr. Paris' behalf. The "brief" admitted the client's guilt despite the fact that he protested his innocence at trial, raised a single nonsensical error, misstated Ohio law, and did not raise obvious, meritorious issues.

On March 26, 1992, the state court of appeals affirmed Mr. Paris' conviction but appellate counsel never informed his client that his conviction was affirmed. Indeed, Mr. Paris did not find out that he had lost until several months after the judgment was entered. Mr. Paris wrote to the appellate court for a copy of his trial transcript because Schuttee refused his incarcerated client's collect phone calls and refused to answer his

letters. In an entry denying Mr. Paris a copy of his trial transcript, the appellate court informed him that his conviction was affirmed over four months earlier.

With the help of a jailhouse lawyer, Mr. Paris contacted the Office of the Ohio Public Defender for assistance in obtaining his trial transcript. On August 10, 1995, the Office of the Ohio Public Defender filed an Application to Reopen pursuant to Ohio App. R. P. 26(B) asserting that Schuttee was ineffective for failing to raise several meritorious issues.

On October 23, 1995, the state court of appeals rejected Mr. Paris' Application to Reopen because he did not file his application within the 90-day time period of the rule. Mr. Paris then timely appealed to the Supreme Court of Ohio. On October 7, 1996, the court affirmed the judgment of the court of appeals.

On October 21, 1996, Mr. Paris filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio, Western Division. In his petition, Mr. Paris argued that he received ineffective representation on direct appeal and that this deficient representation violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

On August 22, 1997, the district court accepted the recommendation of the magistrate and denied relief. The court determined that Mr. Paris was procedurally barred and refused to address the issue of cause and prejudice. Mr. Paris promptly appealed his case to the United States Court of Appeals for the Sixth Circuit.

On March 3, 1999, the court of appeals initially affirmed the judgment of the district court because Mr. Paris had failed to comply with Ohio's 90-day time limit for raising ineffective assistance of appellate counsel claims. Mr. Paris filed a petition for

rehearing in the court of appeals based upon the fact that the ineffective assistance of appellate counsel satisfied cause and prejudice. Specifically, Mr. Paris asserted that appellate counsel's failure to raise obvious, meritorious issues on appeal combined with the failure to inform Paris that he had lost so that he could comply with Ohio's 90-day rule, should excuse any procedural default. On May 26, 1999, the court of appeals granted Mr. Paris' petition, vacated the March 3rd opinion, and issued a new order in its place. *Paris v. Turner*, Case No. 97-4129 (6th Cir. 1999), unreported.

The Sixth Circuit found that "cause and prejudice" existed to excuse the procedural default in Mr. Paris' case. Specifically, the court of appeals determined that it was Schuttee's ineffective representation on direct appeal and his failure to notify Mr. Paris of the adverse decision that caused Mr. Paris to miss Ohio's critical 90-day deadline for appellate ineffectiveness claims. The court of appeals determined that the filing of a five-paragraph brief, which failed to raise obvious and reversible errors, constituted both prejudice and ineffective assistance of appellate counsel. As a secondary matter, the court noted that Mr. Paris should not be blamed for any further delay beyond the initial critical delay created by Schuttee.

Thereafter, Mr. Paris' case was remanded to the district court with instructions to issue the writ of habeas corpus, giving the state a reasonable time to retry him. In compliance with the appellate court's mandate, the district court ordered the retrial of Mr. Paris. The district court specified that Mr. Paris was to be treated as if he entered custody on the date of the writ, September 22, 1999, thus invoking Ohio's statutory 90-day time limit for bringing him to trial. Ohio Rev. Code. §2945.71(E).

SUMMARY OF ARGUMENT

This Court should deny the Warden's Writ of Certiorari for four reasons. First, this case is moot as the Warden did not stay the Sixth Circuit's mandate, the district court issued a conditional writ of habeas corpus, and the time period for Ohio to retry Mr. Paris has expired. The one attempt made by the Warden to stay the mandate was made in the wrong court, voluntarily dismissed, and never renewed. Thus, this Court does not have a live case or controversy before it due to the Warden's own failed actions or inaction.

Second, this case does not involve the usage of ineffective assistance of post-conviction counsel to excuse a procedural default. Rather, as the Sixth Circuit clearly found, it was the ineffective assistance of appellate counsel, Stephen Schuttee, that excused procedural default in Respondent Paris' case. A miniscule five-paragraph appellate brief was prepared by Schuttee that missed obvious, meritorious issues. Further, Schuttee failed to inform his indigent, incarcerated client that his conviction was affirmed. The failure to convey this critical information caused Respondent Paris to miss Ohio's 90-day deadline for appellate ineffectiveness claims. The Sixth Circuit determined that filing an ineffective brief and then failing to communicate information vital to an incarcerated client so that he would know how to proceed served as prejudice and ineffective assistance of appellate counsel. The determination that ineffective assistance of appellate counsel can serve to excuse a procedural default is well-settled. *Murray v. Carrier*, 477 U.S. 478 (1986). No new law was made by this unreported decision nor does it conflict with this Court's precedent.

Third, this case simply does not involve the question propounded by the Warden. The Warden skips over the Sixth Circuit's finding that Schutee was explicitly found ineffective and instead argues that counsel for the Application for Reopening is really to blame and this counsel is post-conviction counsel. Actually, the Sixth Circuit noted counsel for the Application for Reopening as a secondary matter as the heart of the problem was Schuttee's representation or lack thereof. Once the 90-day filing deadline is missed for filing the application, it does not matter how long the applicant waited to file – it will still be denied as untimely.

Even if blame were to lay at the feet of counsel for the Application for Reopening, and it definitely does not as the time for filing the application had expired before counsel had even received a request for help, the Warden's attempt to label this counsel "post-conviction counsel" is baseless and must fail. Appellate Rule 26(B), which is Ohio's method of addressing appellate ineffectiveness claims, is clearly part of the direct appeal process, not post-conviction. Ohio has taken affirmative steps to create a unique state system and remove appellate ineffectiveness claims from the post-conviction process and further stating that they "may be appealed as of right." *Ohio v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (Ohio 1992) ("claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings"). Further, the Supreme Court of Ohio has recognized that counsel must be appointed to assist clients in the preparation of App. R. 26(B) applications. *Ohio v. Getsy*, 87 Ohio St. 3d 1471, 721 N.E.2d 117 (1999). Indeed, the Sixth Circuit has concurred with the Supreme Court of Ohio's rulings making the App. R. 26(B) process part of the direct appeal process. *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000) (application for

reopening is a continuation of the direct appeal itself). The Sixth Circuit is presumably more familiar with Ohio law. *Selvage v. Collins*, 494 U.S. 108 (1990).

Fourth, the conditioning of Respondent Paris' relief on a new trial is not a question worthy of this Court's review. It is well-settled that federal courts have broad discretion in conditioning judgment granting habeas relief. *Hilton v. Braunskill*, 481 U.S. 770 (1987).

In sum, the Warden has presented dead issues to this Court. Further, aside from the problem of mootness, this case presents no reasons to disturb the Sixth Circuit's judgment. Its conclusion that appellate counsel's representation is ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is well-supported by the record and properly serves as cause and prejudice to excuse a procedural default.

ARGUMENT

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE WARDEN FAILED TO EVER STAY THE MANDATE ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. THUS, A CONDITIONAL WRIT OF HABEAS CORPUS ISSUED FROM THE DISTRICT COURT AND THE TIME PERIOD FOR RETRYING RESPONDENT PARIS HAS EXPIRED WITHOUT ANY ACTIVITY FROM THE STATE. THIS CASE IS MOOT.

On May 26, 1999, the United States Court of Appeals for the Sixth Circuit granted Respondent Paris relief. *Paris v. Turner*, Case No. 97-4129 (6th Cir. 1999), unreported. The court of appeals remanded Paris' case to the district court with instructions to issue the writ of habeas corpus, giving the State of Ohio a reasonable time to retry him. *Paris*, Case No. 97-4129 at 6.

In the interim, the Warden filed a request for rehearing *en banc*. On August 19, 1999, the court of appeals rejected the Warden's request for rehearing. The Warden

did not request a stay of the mandate and on August 27, 1999, the court of appeals issued its mandate.[1] Subsequently, on September 22, 1999, the district court issued a conditional writ of habeas corpus in compliance with that mandate.

In the conditional writ, the district court cited to Ohio's Speedy Trial Statute and clearly specified that the time the State of Ohio had for retrying Mr. Paris was to be calculated as if he had entered custody on the date of the issuance of the conditional writ (September 22, 1999). Conditional Writ of Chief Judge Walter Herbert Rice, Southern District, Western Division, September 22, 1999. Under Ohio law, the state had 90 days, or until December 21, 1999, to retry Respondent Paris. Ohio Rev. Code §2945.71(E).[2] Once the 90 days has lapsed, the state is prohibited from retrying him. The State of Ohio has taken absolutely no steps to retry Mr. Paris and may not do so now as the time period specified within the conditional writ has expired.[3]

The Warden did not obtain a stay of the mandate which required Ohio to retry Respondent Paris. The Warden did file a motion to stay the Sixth Circuit's mandate with the district court but this was the wrong court. Only a motion filed in the Sixth Circuit could stay the mandate.[4] The Warden voluntarily dismissed his stay action in the

---

[1] If a petition for rehearing *en banc* is denied, as it was in this case, the mandate from the court of appeals must issue in seven days after the entry of the order denying the petition unless the court otherwise directs. This rule is based on the interest of minimizing unnecessary delay in the administration of justice. 6 Cir. R. 41(a).

[2] This is Ohio's "three for one" provision and for the purposes of computing time each day is counted as three so that the state has 90 days to bring an individual to trial in situations like Mr. Paris' where the time was to be "calculated as if Petitioner entered custody on the charges as of the date of this Writ (September 22, 1999)." Conditional Writ issued by Chief Judge Walter Rice, Southern District of Ohio, Western Division on September 22, 1999.

[3] The Warden has never voiced any objection to the language in the writ.

[4] 6 Cir. IOP 41(d) Stay or Recall of the mandate. A motion for stay or recall of the mandate is referred, as a single-judge matter, to the judge who authored the opinion.

district court and never filed the necessary motion in the court of appeals requesting a recall of the mandate.

With no stay of the mandate and no retrial by the State of Ohio, this case has become moot. Thus, there is no remedy available for the state at this stage that would justify granting the Warden's petition for a writ of certiorari. *Calderon v. Moore*, 518 U.S. 149 (1996) (at least a partial remedy must be available to prevent a case from becoming moot – state had partial remedy as it had actually begun defendant's second trial within the specified period before petition for writ of certiorari was granted).

II. THE APPROPRIATE DISPOSITION OF THE WARDEN'S PETITION IS A DENIAL OF CERTIORARI.

The Warden cannot claim that this case presents novel constitutional questions. In a desperate attempt to try to make the issues appear "novel," the Warden claims that another case, *Edwards v. Carpenter*, No. 98-2060, a case in which this Court held oral argument on February 28, 2000, is very similar to Mr. Paris. The Warden makes this claim even though the questions he presents for this Court's review in the two cases are entirely different. In a feeble effort to demonstrate similarity, the Warden resorts to pointing out that Judge Merritt served on the Carpenter panel and the Paris panel and that both cases involve Ohio's Appellate Rule 26(B). (Petition for Writ of Certiorari, p. 13).

Edwards is inapplicable to this case. *Edwards* addresses the issue of whether an exhausted but procedurally defaulted ineffective assistance of counsel claim can excuse the default of its attendant merit claim. The Warden has never argued that Mr. Paris' cause and prejudice arguments are procedurally defaulted and he may not do so now, for the first time, in this Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646

(1992) citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."). "These principles help to maintain the integrity of the process of certiorari." *Taylor*, 503 U.S. at 645.

Mr. Paris' case is premised on the well-settled principle that ineffective assistance of counsel on direct appeal satisfies the cause and prejudice standard where appellate counsel fails to raise obvious and reversible issues and also fails to communicate the loss of the appeal to the incarcerated client so that he can comply with a rule with a mandatory deadline. Attorney misfeasance on direct appeal can certainly serve as cause and prejudice to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478 (1986). No new law was made by this unreported case.

III. THE WARDEN MISCONSTRUES THE SIXTH CIRCUIT'S CAUSE AND PREJUDICE DETERMINATION. WHERE APPELLATE COUNSEL MISSES OBVIOUS AND REVERSIBLE ERRORS ON APPEAL AND THEN LATER FAILS TO EVER INFORM HIS CLIENT THAT HIS CONVICTION WAS AFFIRMED SO THAT HE MAY PROMPTLY PURSUE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS, A SIXTH AMENDMENT VIOLATION IS CERTAINLY PROVEN. IT IS WELL-SETTLED THAT INEFFECTIVE ASSISTANCE ON A DIRECT APPEAL AS OF RIGHT MAY SERVE AS "CAUSE AND PREJUDICE" TO EXCUSE A PROCEDURAL DEFAULT.

A. This case does not present a question of great importance or scope worthy of certiorari review.

It is important to view the decision below in the proper context. The Warden asserts that Respondent Paris' case turns on whether one has the right to effective assistance of post-conviction counsel and whether the actions of post-conviction counsel can serve as "cause" for procedural default. The Warden's assertion is wrong. Respondent Paris' case concerns the ineffective assistance of counsel that he received on direct appeal. Indeed, ineffective assistance of appellate counsel is exactly what the

Sixth Circuit found in its May 16, 1999 decision. "We have no difficulty in finding that Schuttee [appointed appellate counsel] provided ineffective assistance of appellate counsel as defined under *Strickland v. Washington*, 466 U.S. 668 (1984)." *Paris*, case No. 97-4129 at 5. It is undisputed that the right to the effective assistance of counsel extends to a direct appeal as of right and that ineffectiveness at this stage of the criminal proceedings may serve as cause and prejudice to excuse procedural default. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

B. The Court of Appeals' determination that Mr. Paris received the ineffective assistance of appellate counsel is well supported by the record.

The Warden does not contest that Mr. Schuttee rendered ineffective representation in Respondent Paris' case. Indeed, he concedes that issue as it is impossible to defend a miniscule five-paragraph brief that: 1] admits that client's guilt when he has always asserted his innocence; 2] blatantly misstates Ohio law; 3] raises a single nonsensical error; and 4] misses obvious, meritorious issues. Further, the Warden does not assert, nor has he ever, that appellate counsel communicated the affirmance of the conviction to his indigent, incarcerated client so that he could proceed and comply with Ohio's 90-day rule.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of appellate counsel is proven where counsel fails to develop the legal issues that will allow his client to succeed on appeal. The Sixth Circuit showed, in detail, exactly why the issues missed by appellate counsel were obvious and meritorious. (Petitioner's Appendix, pp. 2a-3a). The Warden has never contested that these missed issues were not meritorious.

C. The court of appeals determination that Mr. Paris demonstrated cause and prejudice is well supported by the record.

In the present case, counsel for Mr. Paris failed to inform him that the state court of appeals had decided his case adversely against him. Mr. Paris learned of the adverse decision over four months after it issued. Further, Mr. Paris learned of the decision only because the appellate court refused his request for a copy of his trial transcript. Ironically, Mr. Paris sought a copy of his transcript so that he could supplement Schutee's five-paragraph brief with additional issues. In its entry denying Mr. Paris access to his trial transcript, the state appellate court informed him that he had already lost and that there was no appeal to supplement.

Appellate counsel has a duty to communicate critical information such as an affirmance or how to proceed with further appeals. *Boyd v. Cowan*, 494 F.2d 338 (6th Cir. 1974). *See also Office of Disciplinary Counsel v. Cox*, 58 Ohio St. 3d 124, 568 N.E.2d 1219 (1991). Recently in *Roe v. Flores-Ortega*, 528 U.S. ___, No. 98-1441, Electronic Citation 2000 WL 201148 (Feb. 23, 2000), this Court made it clear that in the vast majority of cases courts will find that counsel has an obligation to consult with a client regarding appellate rights. *Id.* at *7. Once an appeal is in place, it is imperative that the communication of critical information continues.

By failing to communicate the loss of the appeal to Mr. Paris, appellate counsel neglected, damaged and prejudiced his client as this failure placed Mr. Paris well past the 90-day filing period for filing an Application to Reopen so that he could raise his additional issues. Once the 90-day filing deadline is missed for filing the application, it does not matter how long the applicant waited to file. The applicant can be one day late

or four years late; the application will still be denied as untimely. *Ohio v. Winstead*, 74 Ohio St. 3d 277, 658 N.E.2d 722 (1996) (one-day deadline in filing because of failure of overnight courier service is not "good cause").

D. The Warden incorrectly refers to counsel at the Application for Reopening phase as "post-conviction" counsel. An Application for Reopening is not part of Ohio's post-conviction process.

Given Ohio's application of App. R 26(B), it is completely inaccurate for the Warden to assert that the Sixth Circuit utilized the "misfeasance" of what he terms "post-conviction" counsel to excuse a procedural default. Once the Office of the Ohio Public Defender received Mr. Paris' request for help it was simply too late to file a timely Application for Reopening, regardless of what counsel did from that office. It was appointed appellate counsel, not the Ohio Public Defender, that created the critical delay that prevented Mr. Paris from complying with the 90-day filing requirement. Therefore, Schuttee's ineffectiveness appropriately serves as cause and prejudice to excuse any procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Even if counsel from the Office of the Ohio Public Defender filed the application on the very day that it received Mr. Paris' request for help, the application would still have been untimely as Mr. Paris did not learn of the adverse decision until well beyond the 90-day time period.

The Warden's claim that the Office of the Ohio Public Defender served as "post-conviction" counsel is also completely inaccurate. The State of Ohio has taken affirmative steps to create a unique state system that makes appellate ineffectiveness claims part of the direct appeal process and not part of the state post-conviction process.

In 1992, the Supreme Court of Ohio made it emphatically clear that attacks on the representation of appellate counsel would not be considered if raised in a post-conviction matter. *Ohio v. Murnahan*, 63 Ohio St. d 60, 584 N.E.2d 1204 (Ohio 1992). *Murnahan*, which is responsible for the adoption of Ohio App. R. 26(B), completely banned the usage of post-conviction for appellate ineffectiveness claims. *Murnahan*, 63 Ohio St. 3d at 66, 584 N.E.2d at 1209 (claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings). With the advent of *Murnahan*, all appellate ineffectiveness claims were redirected to the Ohio Courts of Appeal and Ohio's appellate rules were to govern the litigation of all such claims, namely Ohio App. R. 26(B).

The Warden completely ignores the entire basis of the *Murnahan* decision and instead cites a miscellaneous dismissal for the erroneous proposition that an Application to Reopen is a post-conviction matter. *See Ohio v. Robinson*, 74 Ohio St. 3d 1518, 660 N.E.2d 472 (1996). Aside from the fact that *Robinson* is a miscellaneous dismissal that offers no guidance, and *Murnahan* is the seminal case governing applications to reopen, later cases have further clarified that App.R. 26(B) proceedings are part of the direct appeal process.

In early 1996, when *Robinson* was issued, the treatment of appellate ineffectiveness claims was a disaster due to conflicting rules that were still on the books. While the whole purpose of *Murnahan* was to take appellate ineffectiveness claims out of Ohio's post-conviction process, an Ohio Supreme Court Practice Rule remained that divested the appellate courts of jurisdiction to hear the claims. Former S. Ct. Prac. R. II(2)(D)(1). Thus, at the time of *Robinson*, litigants with appellate

ineffectiveness claims were being turned away from the appellate courts because the courts did not have jurisdiction and they were being turned away from the trial courts because appellate ineffectiveness claims were no longer part of Ohio's post-conviction process pursuant to *Murnahan* and App. R. 26(B). *See Ohio v. Howe*, 73 Ohio St. 3d 35, 652 N.E.2d 193 (1995); *Ohio v. Wogensthal*, 75 Ohio St. 3d 273, 662 N.E.2d 16 (1996).

Finally, in April of 1996, the Supreme Court of Ohio reaffirmed that appellate ineffectiveness claims were not part of the post-conviction process. Former S. Ct. Prac. R. II(2)(D)(1) was amended so that appellate courts would have jurisdiction to hear ineffective assistance of appellate counsel claims.

Thus, even if blame were to lay at the feet of the Ohio Public Defender, and it clearly does not because the time for filing the application had expired before the request for assistance was received, the Warden's "post-conviction" counsel assertions must fail. Counsel at the Application for Reopening phase cannot be "post-conviction" counsel as the application is a continuation of the direct appeal itself – that was the whole point of *Murnahan* and clarification between the appellate rules and the supreme court practice rules. This principle was recently affirmed in the Supreme Court of Ohio and the Sixth Circuit Court of Appeals.

In *Ohio v. Gillard*, 86 Ohio St. 3d 1448, 714 N.E.2d 400 (1999), the Supreme Court of Ohio recognized that the App. R. 26(B) procedure was part of direct appeal. In *Gillard*, Ohio had moved the court to set an execution date upon denial of Mr. Gillard's App. R. 26(B) motion. The court denied the state's motion holding that Mr. Gillard was entitled to a stay of execution to permit him to pursue his petition for writ of certiorari to

this Court. Traditionally, the Supreme Court of Ohio has granted stays of execution only to pursue a petition for certiorari after direct appeal is complete and not after the indirect or collateral review is completed. Additionally, the Supreme Court of Ohio has held that counsel should be appointed to assist with the application to reopen pursuant to App. R. 26(B). *Ohio v. Getsy*, 87 Ohio St. 3d 1471, 721 N.E.2d 117 (1999) (case remanded for the appointment of counsel "to represent appellant for purposes of an application for reopening.").

In *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit concurred with the Supreme Court of Ohio's rulings making the App. R. 26(B) process part of the direct appeal. In *White*, the Sixth Circuit noted that *Murnahan* emphatically held that appellate ineffectiveness could not be a post-conviction matter and concluded because "the application for delayed consideration is neither part of a state habeas nor state post-conviction proceeding, it must be a continuation of activities related to the direct appeal itself." *Id.* at 9. This Court has repeatedly recognized that "courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (citing *Rummel v. Estelle*, 445 U.S. 263, 267 n.7 (1980)); *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 153-154 (1979).

Thus, this case involves the intricacies of a unique state court system and the ineffective assistance of appellate counsel. The Warden presents no reason to disturb the Sixth Circuit's judgment in this unreported case.

IV. THE FORM OF RELIEF THAT A FEDERAL COURT DETERMINES IS APPROPRIATE IS A DISCRETIONARY MATTER. THIS CASE PRESENTS NO REASON TO DISTURB THE SIXTH CIRCUIT'S JUDGMENT.

The second assertion offered by the Warden for this Court's review is that the Sixth Circuit had no authority to condition Respondent Paris' release on a new trial. According to the Warden, the Sixth Circuit only had the power to grant Mr. Paris a new direct appeal because ineffective assistance of appellate counsel was in issue. (Petition for Writ of Certiorari, p. 21). This argument flies in the face of this Court's precedent.

Section 2243 of the Judicial Code requires federal courts to "dispose of [habeas corpus petitions] as law and justice require." 28 U.S.C. §2243 (1994). This Court has determined that federal courts have broad discretion in conditioning judgment granting habeas relief. *Hilton v. Braunskill*, 481 U.S. 770 (1987). Indeed, "[f]ederal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief." *Hilton* at 775. "Even in 1894, ...the Court interpreted the predecessor of §2243 as vesting a federal court "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*." *Hilton* at 775 citing *In re Bonner*, 151 U.S. 242, 261 (1894) (emphasis in original).

In addition to *Hilton* and §2234 of the Judicial Code, the Court in *Evitts v. Lucey*, 469 U.S. 387 (1985), made it clear that where ineffective assistance of appellate counsel is proven, conditioning a petitioner's release upon a retrial is entirely appropriate. In *Evitts*, the district court granted a conditional writ of habeas corpus, ordering respondent's release unless the Commonwealth either reinstated his appeal *or retried him*. *Evitts*, 469 U.S. at 831. The United States Court of Appeals affirmed this

relief. Subsequent to granting certiorari, this Court affirmed the decisions below, leaving the form of the conditional writ undisturbed. *Evitts*, 469 U.S. at 391, 405.

Thus, the relief afforded in Respondent's case is appropriate. Moreover, the grant of relief in this case conforms with this Court's precedent. This case presents no reason to disturb the Sixth Circuit's judgment.

CONCLUSION

This case does not present a novel constitutional question for this Court nor does its well-settled issues mirror the *Edwards* case currently before this Court. Indeed, this case involves issues that are moot, and the well settled principles that ineffective assistance of appellate counsel may serve as cause and prejudice to excuse procedural default and that federal courts have discretion in conditioning habeas corpus relief. For these all of these reasons, Respondent Paris respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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BALDWIN'S OHIO REVISED CODE ANNOTATED
RULES OF APPELLATE PROCEDURE
TITLE III GENERAL PROVISIONS

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Current with amendments received through 1/26/2000

APP R 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING

(A) Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the

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application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

CREDIT(S)

(Adopted eff. 7-1-71; amended eff. 7-1-75, 7-1-93, 7-1-94, 7-1-97)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-97 amendment substituted "the Supreme Court" for "a court of appeals" at the end of the first paragraph of division (A) and substituted "magistrate" for "referee" in division (B)(8).

Amendment Note: The 7-1-94 amendment added division (C).

Amendment Note: The 7-1-93 amendment designated division (A); and added division (B).

COMMENTARY

Staff Notes

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shall show the date of filing time-stamped by the Court of Appeals.

Section 2. From the Board of Tax Appeals. The notice of appeal from the Board of Tax Appeals must be filed with the Supreme Court and with that board within thirty days from the date of the entry of the decision of the board and shall set forth or have attached thereto a copy of the decision appealed from and the errors complained of therein. (R.C. 5717.04.)

Section 3. From the Public Utilities Commission. The notice of appeal from the Public Utilities Commission must be filed with that commission and with the Supreme Court within the time specified in R.C. 4903.11.

The word "forthwith" as used in R.C. 4903.21, providing that upon service or waiver of notice of appeal the commission shall forthwith transmit to the Clerk of the Supreme Court a complete transcript of the proceedings, is declared by this Court to mean a period of 30 days and if at the expiration of 30 days such transcript has not been filed or a writ of mandamus requested to compel the commission to file such transcript, the appeal shall be dismissed.

Section 4. Filing Fee. A notice of appeal or of cross-appeal or a copy of a notice of appeal or cross-appeal filed in the Supreme Court shall be accompanied by a fee of forty dollars.

Section 5. Notice of Filing. Copies of a notice of appeal shall be served upon all other parties or their attorneys of record, and proofs of such service shall be filed in the Supreme Court with the notice of appeal or copy thereof.

Section 6. Designation of Counsel. The attorney registration numbers, addresses and telephone numbers of counsel for the respective parties shall be furnished to the Clerk of the Supreme Court by the party filing such notice of appeal or copy thereof at the time of its filing in the Supreme Court.

Section 7. Filing of Single Notice of Appeal. In cases where there are multiple appellants appealing from the same decision of a Court of Appeals or an administrative agency, such appellants should, whenever possible, join in the filing of a single notice of appeal.

[Rule I amended June 20, 1977; amended effective June 25, 1984; January 1, 1986; October 26, 1989.]

RULE II. DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEALS

Section 1. Effect of Failure to Comply With Required Filing of Notice of Appeal in Supreme Court. If a copy of the notice of appeal is not filed or offered for filing in the Supreme Court in compliance with Sections 1, 2, 3, 5, 6 and 7 of Rule I, the Supreme Court may refuse to accept such copy for filing or may dismiss the appeal, either on its own motion or on motion of a party, for lack of prosecution.

Section 2. Notice of Appeal Filed in the Supreme Court Considered as Motion to Certify or for Leave to Appeal. Where the order, judgment or decree of the Court of Appeals that is appealed from was rendered in an action not originating in the Court of Appeals, the copy of the notice of appeal filed in the Supreme Court will be considered as a motion for leave to appeal in a felony case or as a motion to certify in any other case. No separate motion to certify or for leave to appeal need be filed.

Section 3. Consideration as to Existence of Constitutional Question.

(A) If an appellant contends that a case involves a substantial constitutional question and also contends that such case is of public or great general interest, it is necessary to file only one notice of appeal. (See Rule I(A)(a) and (c).)

(B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will, sua sponte, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

Section 4. Memorandum in Support of Claimed Jurisdiction of Supreme Court.

(A) A motion to certify, a motion for leave to appeal or a claimed appeal as of right shall be supported by a memorandum which shall contain:

(1) The same matters required in a brief on the merits (Rule V, Section 1) except that any argument should be limited to presenting with accuracy, brevity and clarity only what is essential to a ready and adequate understanding of the proposition of law to which it relates and why that proposition should be adopted.

(2) Only to the extent not indicated by such propositions of law and such argument, a concise statement of why the case is of public or great general interest, why a substantial constitutional question is involved or why leave to appeal should be granted, such statement to follow the argument.

(B) The failure of appellant to present with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the questions requiring consideration will be sufficient reason for denying the motion to certify or for leave to appeal

or for dismissing an appeal as of right on the ground that no substantial constitutional question is involved.

Unless the "statement of the propositions of law presented" clearly states some proposition of law which could serve as a syllabus, the court may dismiss any motion or appeal sua sponte.

(C) The body of the memorandum should be confined to the minimum number of pages necessary to accurately and clearly present the reasons why the case is of public and great general interest or why leave to appeal should be granted or why a substantial constitutional question exists. The body of the memorandum shall not exceed thirty pages.

Section 5. Number of Copies and Service of and Time for Filing Memorandum. Twelve copies of such memorandum, together with proof of service of copies thereof on all other parties or their attorneys of record, must be filed in the Supreme Court at the same time that the notice of appeal is filed therein pursuant to Rule I, Section 1(B).

Section 6. Memorandum Opposing Jurisdiction of the Supreme Court. Within thirty days after the filing of the notice of appeal in the Supreme Court, appellee shall file a memorandum opposing jurisdiction. Twelve copies of such memorandum, together with proof of service of copies thereof on all other parties or their attorneys of record, must be filed at the same time that such memorandum is filed. Such memorandum shall be prepared in the same form as the appellant's memorandum, and the appellee shall state propositions of law which would support judgment in his favor. The body of the memorandum shall not exceed thirty pages. Appellee shall include in the appendix of such memorandum a complete copy of any cited statute, constitutional provision, etc., unless it is already set forth in the appellant's memorandum.

Section 7. Formal Requirements. Each memorandum filed pursuant to Sections 4, 5 and 6 of this rule must conform with the requirements of Rule VI.

Section 8. Procedure on Appeal in Felony Case Where Notice of Appeal Is Not Filed as Specified. In those cases where the time has expired for the filing in the Court of Appeals or in the Supreme Court of a notice of appeal in a felony case, adequate reasons for the delay in such filing must be given and, where based upon facts, those facts must be evidenced by affidavit or deposition filed in support of such motion for leave to appeal.

Section 9. Record Not to Be Sent to Supreme Court Until Appeal Allowed. Except in those cases originating in the Court of Appeals, and in those cases in which the death penalty has been affirmed, unless otherwise ordered and notwithstanding R.C. 2505.08, neither the original papers nor the transcript of proceedings shall be transmitted to the Supreme Court, unless and until a motion to certify the record has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule.

Section 10. Record to Be Sent to Supreme Court After Jurisdiction Determined. Upon the allowance of a motion to certify the record or for leave to appeal or, in the case of a claimed appeal as of right, on the overruling of the motion to dismiss referred to in Section 3 of this rule, the Clerk of this Court shall issue an order to the Court of Appeals requiring the clerk of that court to prepare a transcript of the docket and journal entries in such cause in that court, upon being paid by the appellant the lawful fees therefor, and to transmit the transcript and all the papers in the case, duly certified, to the Clerk of the Supreme Court within ten days.

[Rule II amended March 1, 1979; amended effective July 16, 1990.]

RULE III. CERTIFICATION BY COURT OF APPEALS BECAUSE OF CONFLICT

Section 1. Time for Filing Copy of Order of Certification. Where the judges of a Court of Appeals have made an order finding that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another Court of Appeals and providing for certification of the record of the case to the Supreme Court for review and final determination, a party who would be adversely affected by the judgment so agreed upon shall, within thirty days of the date of such order of certification, file in the Supreme Court a certified copy of such order.

Section 2. Filing Fee. A certified copy of the order of certification filed in the Supreme Court shall be accompanied by a filing fee of forty dollars.

Section 3. Notice of Filing. Copies of such order of certification shall be served upon all other parties or their attorneys of record, and proofs of such service shall be filed in the Supreme Court with the certified copy of such order of certification.

Section 4. Designation of Counsel. The attorney registration numbers, addresses and telephone numbers of counsel for the respective parties shall be furnished to the Clerk of the Supreme Court by the party filing the certified copy of such order of certification at the time of its filing in the Supreme Court.

Section 5. Effect of Failure to Comply With This Rule. If a certified copy of the order of

Staff Commentary to Rule I
(April 1, 1996 Amendments)

Section 1

This amendment extends the certification requirements of C.P. Sup. R. 65 to appointed attorneys who represent capital defendants before the Supreme Court.

RULE II. INSTITUTION OF APPEALS; NOTICE OF APPEAL

Section 1. Types of Appeals.

(A) Appeals from Courts of Appeals.

(1) Appeals of right. An appeal of a case in which the death penalty has been affirmed for an offense committed prior to January 1, 1995, an appeal from the decision of a court of appeals under App. R. 26(B) in a capital case, or a case that originated in the court of appeals invokes the appellate jurisdiction of the Supreme Court and shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S. Ct. Prac. R. VI.

(2) Claimed appeals of right. An appeal that claims a substantial constitutional question, including an appeal from the decision of a court of appeals under App. R. 26(B) in a noncapital case, may invoke the appellate jurisdiction of the Supreme Court and shall be designated a claimed appeal of right. In accordance with S. Ct. Prac. R. III, the Supreme Court will determine whether to allow the appeal.

(3) Discretionary appeals. An appeal that involves a felony or a question of public or great general interest invokes the discretionary jurisdiction of the Supreme Court and shall be designated a discretionary appeal. In accordance with S. Ct. Prac. R. III, the Supreme Court will determine whether to allow the appeal.

(4) Certified conflict cases. A case in which the court of appeals has issued an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution invokes the appellate jurisdiction of the Supreme Court. In accordance with S. Ct. Prac. R. IV, the Supreme Court will act upon the court of appeals order.

(B) Appeals from Administrative Agencies: Board of Tax Appeals; Public Utilities Commission; Power Siting Board.

An appeal that involves review of the action of the Board of Tax Appeals, the Public Utilities Commission, or the Power Siting Board invokes the appellate jurisdiction of the Supreme Court. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S. Ct. Prac. R. VI.

(C) Appeals from Courts of Common Pleas.

An appeal of a case in which the death penalty has been imposed for an offense committed on or after January 1, 1995, invokes the appellate jurisdiction of the Supreme Court and shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S. Ct. Prac. R. VI and XIX.

Section 2. Institution of Appeal from Court of Appeals.

(A) Perfection of Appeal.

(1) To perfect an appeal from a court of appeals to the Supreme Court, other than in a certified conflict case (which is addressed in S. Ct. Prac. R. IV), the appellant shall file a notice of appeal in the Supreme Court within 45 days from the entry of the judgment being appealed. The date the court of appeals filed its judgment entry for journalization with its clerk, in accordance with App. R. 22(E), shall be considered the date of entry of the judgment being appealed. If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a memorandum in support of jurisdiction, in accordance with S. Ct. Prac. R. III, at the time the notice of appeal is filed. Except as provided in divisions (A)(2), (3), and (4) of this section, the 45-day time period for filing a notice of appeal and memorandum in support of jurisdiction is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal. The Clerk of the Supreme Court shall refuse to file a notice of appeal or a memorandum in support of jurisdiction that is tendered for filing after this time period has passed.

(2) (a) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal or cross-appeal in the Supreme Court within the later of the time prescribed by division (A)(1) of this section or 10 days after the first notice of appeal was filed.

(b) A notice of appeal shall be designated and treated as a notice of cross-appeal if it is filed both:

(i) after the original notice of appeal was filed in the case;

(ii) by a party against whom the original notice of appeal was filed.

(c) If a notice of cross-appeal is filed, a memorandum in support of jurisdiction for the cross-appeal shall be filed by the deadline imposed in S. Ct. Prac. R. III, Section 4.

(3) (a) In a claimed appeal of right or a discretionary appeal, if the appellant intends to seek from the Supreme Court an immediate stay of the court of appeals judgment that is being appealed, the appellant may file a notice of appeal in the Supreme Court without an accompanying memorandum in support of jurisdiction, provided both of the following conditions are satisfied:

(i) A copy of the court of appeals judgment entry being appealed shall be attached to the notice of appeal.

(ii) A motion for stay of the court of appeals judgment shall accompany the notice of appeal.

(b) A memorandum in support of jurisdiction shall be filed no later than 45 days from the entry of the court of appeals judgment being appealed. The Supreme Court will dismiss the appeal if the memorandum in support of jurisdiction is not timely filed pursuant to this provision.

(4) (a) In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing a motion for delayed appeal and a notice of appeal. The motion shall state the date of entry of the judgment being appealed and adequate reasons for the delay. Facts supporting the motion shall be set forth in an affidavit. A copy of the decision being appealed shall be attached to the motion.

(b) The provision for delayed appeal applies to appeals on the merits and does not apply to appeals involving postconviction relief, including appeals brought pursuant to *State v. Murnahan* (1992), 63 Ohio St. 3d 60, and App. R. 26(B). The Clerk shall refuse to file motions for delayed appeal involving postconviction relief.

(c) If the Supreme Court grants a motion for delayed appeal, the appellant shall file a memorandum in support of jurisdiction within 30 days after the motion for delayed appeal is granted.

(B) Contents of Notice of Appeal.

(1) The notice of appeal shall state all of the following:

(a) The name of the court of appeals whose judgment is being appealed;

(b) The court of appeals caption and case number;

(c) The date of the entry of the judgment being appealed;

(d) That one or more of the following are applicable:

(i) The case involves affirmance of the death penalty;

(ii) The case originated in the court of appeals;

(iii) The case raises a substantial constitutional question;

(iv) The case involves a felony;

(v) The case is one of public or great general interest;

(vi) The case claims ineffective assistance of appellate counsel. [See *State v. Murnahan* (1992), 63 Ohio St. 3d 60, and App. R. 26(B).]

See Form A following these rules for a sample notice of appeal from a court of appeals.

(2) In an appeal of right, the notice of appeal shall be accompanied by a copy of the court of appeals judgment entry that is being appealed. If the opinion of the court of appeals serves as its judgment entry and is in excess of 10 pages, a copy of the cover page of the opinion may be filed in lieu of the complete opinion.

(C) Notice to the Court of Appeals.

The Clerk of the Supreme Court shall send a copy of the notice of appeal or cross-appeal to the clerk of the court of appeals whose judgment is being appealed.

(D) Jurisdiction of Court of Appeals after Appeal to Supreme Court Is Perfected.

(1) After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to App. R. 26, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

(2) In all appeals from a court of appeals, the court of appeals retains jurisdiction to appoint counsel to represent indigent parties before the Supreme Court where a judgment of the court of appeals is being defended by a defendant or upon remand and order of the Supreme Court that counsel be appointed in a particular case.

Section 3. Institution of Appeal from Administrative Agency.

(A) Appeal from the Board of Tax Appeals.

(1) A notice of appeal from the Board of Tax Appeals shall be filed with the Supreme Court and the Board within 30 days from the date of the entry of the decision of the Board, include a copy of the decision being appealed, set forth the claimed errors, and otherwise be in conformance with section 5717.04 of the Revised Code. See Form B following these rules for a sample notice of appeal from the Board of Tax Appeals.

(2) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal pursuant to section 5717.04 of the Revised Code.

(B) Appeal from the Public Utilities Commission.

(1) A notice of appeal from the Public Utilities Commission shall be filed with the Supreme Court and with the Commission within the time specified in and in conformance with sections 4903.11 and 4903.13 of the Revised Code. See Form C following these rules for a sample notice of appeal from the Public Utilities Commission.

(2) If a party files a notice of appeal in the Supreme Court, any other party may file a notice of cross-appeal pursuant to sections 4903.11 and 4903.13 of the Revised Code.

(C) Appeal from the Power Siting Board.

A notice of appeal or cross-appeal from the Power Siting Board shall be filed with the Supreme Court and the Board in accordance with division (B) of this section and pursuant to section 4906.12 of the Revised Code. See Form D following these rules for a sample notice of appeal from the Power Siting Board.

Section 4. Filing of Joint Notice of Appeal.

Where there are multiple parties appealing from the same decision of a court of appeals or an administrative agency, appellants may join in the filing of a single notice of appeal.

Section 5. Caption of Appeal.

Except in appeals from the Public Utilities Commission or the Power Siting Board, an appeal shall be docketed under the caption given to the action in the court or agency whose decision is being appealed.

Staff Commentary to Rule II
(April 1, 1996 Amendments)

Section 1(A)(1) and (2)

The new language provides that only capital *Murnahan* cases are considered appeals of right. Noncapital *Murnahan* cases will be treated as claimed appeals of right, since these cases claim substantial constitutional questions. As with other claimed appeals of right, they will be considered on the merits only if, after reviewing jurisdictional memoranda, the Court decides to allow the appeal under S. Ct. Prac. R. III.

Section 1(C)

This new provision classifies as appeals of right the new death penalty appeals that will be brought to the Supreme Court under the November 1994 amendment to the Ohio Constitution.

Section 2(A)(1)

The appellant may appeal a court of appeals decision within 45 days from "entry of the judgment being appealed". The amendment defines the date of "entry of the judgment being appealed" consistent with App. R. 22(E).

48. (1983) Pursuant to RC § 2945.67(A), the state may, by leave of court, appeal any decision of a trial court in a criminal case which is adverse to the state, except the final verdict. State v. Ulrich, 17 OApp3d 179, 17 OBR 368, 478 NE2d 809.

49. (1983) In addition to those instances in which the state is provided an appeal as of right pursuant to RC § 2945.67, the state may, with leave of court, appeal any other decision of a trial court in a criminal case except the final verdict. RC § 2945.67, applied. [Northwood v. Volschow (1980), 68 OApp2d 187, overruled in part.] State v. Owen, 16 OApp3d 384, 16 OBR 452, 476 NE2d 358.

50. (1983) Pursuant to RC § 2945.67, a court of appeals is without jurisdiction to hear the state's appeal from a final verdict of not guilty with regard to a violation of RC § 4511.21, because, had appellee been convicted of the offense, his conduct would have constituted a criminal offense pursuant to RC § 2901.03. State v. Huxtable, 13 OApp3d 371, 13 OBR 453, 469 NE2d 914.

51. (1983) The double jeopardy clause does not prohibit the correction of a technically erroneous sentence. The payment of a fine, which can only be considered a discretionary, additional penalty, does not prevent the vacation of that original sentence and the imposition of a mandatory term of imprisonment for a violation of RC § 2923.17. State v. Vaughn, 10 OApp3d 314, 10 OBR 520, 462 NE2d 444.

52. (1982) A defendant is put in jeopardy where, after the jury had been sworn and evidence presented by the state, the trial court dismisses three counts of the indictment on defendant's motion for acquittal. An appeal by the state does not lie from the entry of such dismissals. State v. Lewis, 4 OApp3d 275, 4 OBR 494, 448 NE2d 487.

53. (1981) The state has a right of appeal to correct an improper sentence. State v. Howell, 5 OApp3d 92, 5 OBR 206, 449 NE2d 523.

54. (1981) Where a trial court sustains a portion of defendant's motion to suppress and the state fails to appeal that ruling pursuant to CrimR 12(J), RC § 2945.67, and AppR 4(B), the state is precluded from contesting that portion of the suppression ruling unfavorable to it in an appeal by defendant from his conviction based upon the evidence which was not suppressed. State v. Felty, 2 OApp3d 62, 2 OBR 69, 440 NE2d 803.

55. (1980) The prosecution cannot appeal an acquittal, no matter how erroneous, where jeopardy has attached. Northwood v. Volschow, 68 OApp2d 187, 22 OO3d 283, 428 NE2d 466.

56. (1976) The right to appeal is a substantive right which may be created by statute but not by rule of court. State v. Leary, 47 OApp2d 1, 1 OO3d 152, 351 NE2d 793.

§§ 2945.68, 2945.69, 2945.70

Repealed, 137 v H 1168, § 2 [GC §§ 13446-2—13446-4; 113 v 123; Bureau of Code Revision, 10-1-53; 131 v 682; 134 v H 511; 137 v H 219]. Eff 11-1-78.

These sections concerned application to file bill of exceptions, appointment of attorney, decision of the court.

Note: RC § 2945.68 is also repealed by 146 v S 2, § 2. Eff 7-1-96.

[TIME FOR TRIAL]

§ 2945.71 Time within which hearing or trial must be held.

(A) A person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after his arrest or the service of summons.

(B) A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:

(1) Within forty-five days after his arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after his arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after his arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after his arrest if the accused is held in jail in lieu of bail on the pending charge;

(2) Shall be brought to trial within two hundred seventy days after his arrest.

(D) A person against whom one or more charges of minor misdemeanor and one or more charges of misdemeanor other than minor misdemeanor, all of which arose out of the same act or transaction, are pending, or against whom charges of misdemeanors of different degrees, other than minor misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial within the time period required for the highest degree of misdemeanor charged, as determined under division (B) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

(F) This section shall not be construed to modify in any way section 2941.401 [2941.40.1], or sections 2963.30 to 2963.35 of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 135 v H 716 (Eff 1-1-74); 136 v S 83 (Eff 10-17-75); 138 v S 288 (Eff 10-22-80); 139 v S 119. Eff 3-17-82.

Analogous to RC § 2945.71 (GC § 13447-1; 113 v 123(193); Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The provisions of section 3 of SB 119 (139 v—) read as follows:

SECTION 3. The provisions of Sections 1 and 2 of this act apply in relation to all persons who commit any felony offense on or after the effective date of this act and to all persons who commit any felony offense prior to the effective date of this act who are not arrested in relation to the offense until a time on or after the effective date of this act.

Citation
28 USCA s 2243
28 U.S.C.A. § 2243
⊳

Found Document

Rank 1 of 1

Database
USCA

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 153--HABEAS CORPUS

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Current through P.L. 106-73, approved 10-19-1999

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

CREDIT(S)

1994 Main Volume

(June 25, 1948, c. 646, 62 Stat. 965.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755-761).

Section consolidates sections 455-461 of Title 28, U.S.C., 1940 ed.

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permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

[Amended April 30, 1979, effective August 1, 1979; April 29, 1994, effective December 1, 1994; April 24, 1998, effective December 1, 1998.]

6 CIR. R. 40. PETITION FOR REHEARING—EXTENSION OF TIME TO FILE

Counsel should not file motions for extension of time to file a petition for rehearing except for the most compelling reasons. If an untimely petition is not accompanied by a motion for an extension of the filing time, the petition will be returned, unfiled, to the sending party.

Committee Note

New rule. Former I.O.P. 20.1. For petitions for rehearing in death penalty cases, see 6 Cir. R. 22(c)(9). For rehearing en banc, see FRAP 35 and 6 Cir. R. 35.

[Effective December 1, 1998.]

6 Cir. I.O.P. 40. Petitions for Rehearing—When Necessary—Extension of Time

(a) When Necessary. It is not necessary to file a petition for rehearing, with or without a suggestion for rehearing en banc, in this Court as a prerequisite to the filing of a petition for writ of certiorari in the Supreme Court of the United States. A petition for rehearing is intended to bring to the attention of the panel claimed error of fact or law in the opinion. It is not to be used for reargument of the issues previously presented.

(b) Review and Disposition. Petitions for rehearing unaccompanied by a suggestion for rehearing en banc are reviewed by panel members only. If rehearing is granted, this Court will usually reconsider a case without additional briefing or argument. It may occasionally allow supplemental briefing and reargument. If a petition for rehearing is granted, this Court may make a final disposition of the case without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(c) Extension of Time or Leave to File Out-of-Time. A motion for additional time to file a petition for rehearing or for permission to file out of time is referred, as a single-judge matter, to the judge who authored the opinion. In either case, counsel should not assume that the request for additional time will be granted.

Committee Note

(a), (b)—former I.O.P. 20.1, 20.2; (c)—former I.O.P. 17.11.1. For rehearing en banc, see 6 Cir. I.O.P. 35.

[Effective December 1, 1998.]

FRAP 41. MANDATE: CONTENTS; ISSUANCE AND EFFECTIVE DATE; STAY

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) *On Petition for Rehearing or Motion.* The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) *Pending Petition for Certiorari.*

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

[Amended April 29, 1994, effective December 1, 1994; April 24, 1998, effective December 1, 1998.]

6 CIR. R. 41. ISSUANCE OF MANDATE; STAY OF MANDATE

(a) Stay of Mandate. *In the interest of minimizing unnecessary delay in the administration of justice, the issuance of the mandate will not be stayed simply upon request beyond the time necessary for disposition of a motion seeking a stay. The mandate ordinarily will issue pursuant to FRAP 41(b) unless there is a showing, or an independent determination by this Court, that a petition for writ of certiorari*

would present a substantial question and that there is good cause for a stay.

(b) Time for Filing Motion to Stay. *A motion to stay the mandate must be received in the clerk's office within 7 days after the time to file a petition for rehearing expires or seven days from entry of an order on petition for rehearing.*

(c) Duration of Stay Pending Application for Certiorari. *A stay of the mandate pending application to the Supreme Court for a writ of certiorari shall not be effective later than the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. § 2101 or Rule 13 of the Supreme Court Rules, as applicable. If during the period of the stay there is filed with the clerk a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately.*

Committee Note

Former 6th Cir. R. 15.

[Effective December 1, 1998.]

6 Cir. I.O.P. 41. Issuance of Mandate; Stay of Mandate—Motion for Stay

(a) Issuance of Mandate. The mandate is the document by which this Court relinquishes jurisdiction and authorizes the originating district court or agency to enforce the judgment of this Court. The mandate issues 21 days after the entry of judgment or, in a civil case in which the United States or its officer or agency is a party, within 52 days after the entry of judgment, or seven days from entry of an order denying rehearing and consists of a certified copy of the original judgment, a copy of any opinion and any directions concerning costs. Copies of the mandate are distributed to all parties and the district court clerk's office. The record is then returned to the district court. In agency cases, the mandate may be enlarged or shortened by Court order.

(b) Timely Petition for Rehearing; Stay of Mandate. The timely filing of a petition for rehearing will stay the issuance of the mandate until seven days after the denial of the petition. If the petition is granted, the mandate will issue 21 days after the new ruling.

(c) Stay of Mandate Pending Application for Certiorari. The filing of a petition for a writ of certiorari does not automatically stay the issuance of the mandate. A separate application for stay of mandate must be made in the form of a motion to this Court; however, that application will not be granted automatically. Pursuant to 6 Cir. R. 41(c), if a petition for a writ of certiorari is filed during the pendency of a stay, the stay of mandate shall continue until the Supreme Court acts on the petition. The issuance of the mandate does not affect a party's right to seek a writ of certiorari or the power of the Supreme Court to grant the writ.

(d) Stay or Recall of the Mandate. A motion for stay or recall of the mandate is referred, as a single judge matter, to the judge who authored the opinion.

Committee Note

(a)—former I.O.P. 23.1; (b)—former I.O.P. 23.2; (c)—former I.O.P. 23.3; (d)—former I.O.P. 17.1.2.

[Effective December 1, 1998.]

FRAP 42. VOLUNTARY DISMISSAL

(a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

[Amended April 24, 1998, effective December 1, 1998.]

6 CIR. R. 42. [RESERVED]

6 Cir. I.O.P. 42. [Reserved]

FRAP 43. SUBSTITUTION OF PARTIES

(a) Death of a Party.

(1) *After Notice of Appeal Is Filed.* If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) *Before Notice of Appeal Is Filed—Potential Appellant.* If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if there is no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

Office of the Ohio Public Defender
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FAX NUMBER: (614) 728-3670

DAVID H. BODIKER
State Public Defender

March 20, 2000

Clerk of Courts
Supreme Court of the United States
One 1st St.
Washington, DC 20543

Re: Laurence Mack, Warden v. David L. Paris
No. 99-1184

Dear Clerk:

Enclosed please find the original and 10 copies of RESPONDENT PARIS' BRIEF IN OPPOSITION, Motion for Leave to Proceed Informa Pauperis and Affidavit of Indigency to be filed in the above referenced case. Please return the extra date stamped copies to me in the enclosed self-addressed, postage prepaid envelope.

Thank you for your consideration in this matter.

Sincerely,

Angela Miller
Assistant State Public Defender

AM:gg

Enclosure

RECEIVED
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-1184

In the Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

-vs-

DAVID L. PARIS,
Respondent.

CERTIFICATE OF SERVICE

I, Angela Miller, a member of the Bar of this Court, hereby certify that on this 20th day of March, 2000, a copy of the foregoing RESPONDENT PARIS' BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS, AND AFFIDAVIT OF INDIGENCY was deposited in a United States Mail Box, first class, postage prepaid, pursuant to Rule 29.3, to Edward B. Foley, State Solicitor, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215. I further certify that all parties required to be served have been served.

ANGELA MILLER
Counsel of Record

COUNSEL FOR RESPONDENT